BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc. | DOCKET NO. 001305-TP<br>ORDER NO. PSC-02-0878-FOF-TP<br>ISSUED: July 1, 2002 |

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER ON PROCEDURAL MOTIONS AND MOTIONS FOR RECONSIDERATION

BACKGROUND

On September 1, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for arbitration of certain issues in a new interconnection agreement with Supra Telecommunications and Information Systems, Inc. (Supra). BellSouth's petition raised fifteen disputed issues. Supra filed its response, and this matter was set for hearing. In its response Supra raised an additional fifty-one issues. In an attempt to identify and clarify the issues in this docket, issue identification meetings were held on January 8, 2001, and January 23, 2001. At the conclusion of the January 23 meeting, the parties were asked by our staff to prepare a list with the final wording of the issues as they understood them. BellSouth submitted such a list, but Supra did not, choosing instead to file on January 29, 2001, a motion to dismiss the arbitration proceedings. On February 6, 2001, BellSouth filed its response. In Order No. PSC-01-1180-FOF-TI, issued May 23, 2001, we denied Supra's motion to dismiss, but on our own motion ordered the parties to comply with the terms of their prior agreement by holding an inter-company Review Board meeting. Such a meeting was to be held within 14 days of the issuance of our Order, and a report on the outcome of the meeting was to be filed with us within 10 days after completion of the meeting. The parties were placed

on notice that the meeting was to comply with Section 252(b)(5) of the Telecommunications Act of 1996 (Act).

Pursuant to the Order, the parties held meetings on May 29, 2001, June 4, 2001, and June 6, 2001. The parties then filed post-meeting reports. Thereafter, several of the original issues were withdrawn by the parties. An additional twenty issues were withdrawn or resolved by the parties either during mediation or the hearing, or in subsequent meetings. Although some additional issues were settled, thirty-seven disputed issues remained.

We conducted an administrative hearing in this matter on September 26-27, 2001. On February 8, 2002, staff filed its post-hearing recommendation for our consideration at the February 19, 2002, Agenda Conference. Prior to the Agenda Conference, the item was deferred and placed on the March 5, 2002, Agenda Conference.

By Order No. PSC-02-0413-FOF-TP (Final Order), issued March 26, 2002, we resolved the substantive issues presented for our consideration, as well as several procedural motions filed by Supra on February 18, 21, and 27. A few minor scrivener's errors were corrected by Order No. PSC-02-0413A-FOF-TP, issued March 28, 2002.

On April 10, Supra filed a Motion for Reconsideration of Denial of its Motion for Rehearing of Order No. PSC-02-0413-FOF-TP. Supra also filed a separate Motion for Reconsideration and Clarification of Order No. PSC-02-0413-FOF-TP, portions of which were identified as confidential. On April 17, 2002, BellSouth filed responses in opposition to both Motions.

On April 24, 2002, Supra also filed a Motion to Strike and Reply to BellSouth's Opposition to Supra's Motion for Reconsideration for New Hearing. BellSouth filed its response in opposition on May 1, 2002.

On May 7, 2002, Supra filed a Motion for Leave to File Reply to BellSouth's Opposition to Motion to Strike, or in the Alternative, to Strike New Issues Raised in BellSouth's Opposition. On May 16, 2002, BellSouth filed its response in Opposition.

On May 13, 2002, BellSouth filed its Request for Leave to File Supplemental Authority.

On May 24, 2002, BellSouth filed a Motion for Reconsideration of Order No. PSC-02-0663-CFO-TP, wherein the Prehearing Officer denied confidential treatment of certain information contained in an April 1, 2002, letter to Commissioner Palecki.

On May 29, 2002, Supra filed a Motion for Reconsideration of Order No. PSC-02-0700-PCO-TP.

On May 31, 2002, Supra filed a Cross Motion for Clarification and Opposition to BellSouth's Motion for Reconsideration and Partial Reconsideration of Order No. PSC-02-0663-FOF-TP.

This Order addresses Supra's and BellSouth's Motions for Reconsideration, as well as the Motion to Strike, the Motion for Leave to File Reply or the Alternative to Strike, Cross Motion for Clarification and Partial Reconsideration, and the Request for Leave to File Supplemental Authority.

## JURISDICTION

We have jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes. Section 252 states that a state commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. Further, while Section 252(e) of the Act reserves the state's authority to impose additional conditions and terms in an arbitration consistent with the Act and its interpretation by the FCC and the courts, we utilize discretion in the exercise of such authority. In addition, Section 120.80(13)(d), Florida Statutes, authorizes us to employ procedures necessary to implement the Act.

We also retain jurisdiction of our post-hearing orders for purposes of addressing Motions for Reconsideration pursuant to Rule 25-22.060, Florida Administrative Code, and of our prehearing officers' orders pursuant to Rule 25-22.0376, Florida Administrative Code.

## I. MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY

As stated in the Background, On May 13, 2002, BellSouth asked for leave to file as supplemental authority the recent Supreme Court decision in Verizon Communications Inc. et al. v. Federal Communications Commission, et al., Case Nos. 00-511, 00-555, 00-587, 00-590, and 00-602, 535 U.S. _____, 2002 WL 970643 (May 13, 2002). BellSouth contends that the decision bears directly on Issue M in this case, which pertains to the meaning of the phrase "currently combines" as it relates to UNE combinations.

Supra did not file a response to BellSouth's request.

Upon consideration, we grant BellSouth's request. To the extent, if any, that the Verizon decision impacts Issue M, the case is accepted as authority upon which we may rely.

## II. Supra's Motion to Strike and Reply to BellSouth's Opposition to Supra's Motion for Reconsideration for a New Hearing in Docket No. 001305-TP (Motion to Strike) and/or Supra's Motion for Leave to File Reply to BellSouth's Opposition to Motion to Motion to Strike, or in the Alternative, to Strike New Issues Raised in BellSouth's Opposition?

### A. Motion to Strike

Supra

In its Motion, Supra seeks to strike certain portions of BellSouth's response which it deems scandalous and designed to harass and embarrass. Specifically, Supra asks to have Section VI of BellSouth's Opposition stricken, wherein BellSouth contends that Supra has deliberately created delay in this proceeding. Supra also seeks to reply to BellSouth's opposition to its Motion, and states that nothing in the Florida Administrative Rules expressly prohibits the filing of a necessary reply. Supra asserts that BellSouth should not be permitted to benefit from its deliberate silence and desire to conceal information from Supra. It considers disingenuous BellSouth's assertions that Supra deliberately delayed pursuing its assertions of wrongdoing until after our staff's post hearing recommendation in this docket was filed, and that Supra

intentionally waited until after we voted before issuing its public records request. Supra notes that BellSouth cites no law or legal precedent requiring Supra to file its Motion for a new hearing in October of 2001. As such, Supra maintains that BellSouth's assertion that Supra delayed in filing for a new hearing intentionally is baseless. Supra then counters that BellSouth could have notified Supra of a Commission staff person's wrongdoing as early as May 3, 2001, but that it chose to remain silent.

Supra further maintains that a private conversation was held between Marshall Criser, BellSouth's Vice-President of Regulatory Affairs, and Dr. Mary Bane, Executive Director of the Commission, on or before September 21, 2001, regarding one of our staff, but the person was not reassigned from the instant docket. Supra presumes that Mr. Criser communicated to Dr. Bane the degree of importance BellSouth attached to Docket No. 001305-TP, and this is why the staff person was not terminated or reassigned. Supra also maintains that upon notification of the staff person's communications, Supra was assured that an internal investigation would be conducted, and was asked by our General Counsel not to take any action until after completion of that investigation. Supra then asserts that no meaningful investigation was completed, and states that any delay in its filing of a motion for a new hearing prior to February 8, 2002, was a direct consequence of the conspiracy and cover-up engaged in by both BellSouth and senior managers of this Commission. Supra asserts that our failure to notify it immediately of the staff person's conduct and remove that person from all cases involving BellSouth, is an indication of widespread bias in favor of BellSouth, and is the only reason why this information was not included in Supra's Motion for Rehearing filed on February 18, 2002.

Supra also asserts that while it and BellSouth filed a Joint Motion of Voluntary Dismissal Without Prejudice of Docket No. 001097-TP, it had sought a dismissal from the outset of that proceeding. Supra now believes that BellSouth sought the voluntary dismissal in order for BellSouth to claim that the dismissal demonstrates that Supra is not concerned with its due process rights, and to ensure that Kim Logue remained and participated in Docket No. 001305-TP.

Supra's final assertion is that the dates of its public records requests are impertinent and immaterial in light of BellSouth's and what it perceives as our silence regarding the substance of such e-mails, and BellSouth's arguments regarding such are scandalous and designed to divert attention from BellSouth's misconduct. Supra argues that BellSouth's entire argument under Part VI of its Motion must be stricken as impertinent, immaterial and scandalous.

BellSouth

BellSouth asserts that Supra's Motion is an impermissible filing. BellSouth contends that it is well-settled that reply memorandums are not recognized by our rules or the rules of the Administrative Procedures Act, and notes that Supra has raised this very argument in Docket No. 980119-TP. BellSouth also notes that Supra's Motion to Strike is pursuant to Rule 1.140(f) of the Florida Rules of Civil Procedure. BellSouth argues that the rule contemplates the striking of matter from any pleading, and asserts that Supra's Motion is not a pleading subject to the rule.

In addition, BellSouth argues that even if one considers its Opposition to Supra's Motion for Reconsideration a "pleading" as contemplated by Rule 1.140, Supra has not demonstrated that the matter to be stricken is "wholly irrelevant, can have no bearing on the equities and no influence on the decision." *Citing* McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas, P.A., 704 So. 2d 214, 216 (Fla. 2nd DCA 1998). BellSouth argues that, much to the contrary, its argument that Supra should not benefit from its delay in complaining about the "appearance of impropriety" in this Docket is very relevant to Supra's request for us to reconsider our decision to deny Supra a rehearing in this matter. Furthermore, BellSouth contends that the allegations in Section VI should not be considered libelous or defamatory simply because the matters set forth therein are based upon what it understands to be uncontroverted facts. BellSouth contends that the fact that Supra disagrees with its argument that Supra intended to delay does not amount to a "scandalous" pleading.

B. Motion for Leave to File Reply or Alternative Motion to Strike Supra

Supra asks that it be allowed to file a Reply addressing BellSouth's request for sanctions. Supra contends that pursuant to Rule 28-106.204, Florida Administrative Code, any request for relief should be made by motion, instead of buried in a reply. If it is not allowed to file such a reply, Supra asks that the pertinent section of BellSouth's response, Section IV, be stricken.

BellSouth

BellSouth argues that Supra's Motion for Leave should be denied because such a reply is not contemplated. BellSouth also argues that simply because it raised a new issue in its response does not authorize Supra to reply; otherwise, we would be caught in cycle of perpetual filings every time a new issue arises.[1]

BellSouth further argues that "courts should look to the substance of a motion and not to the title alone." *Citing* Mendoza v. Board of County Commissioners/Dade County, 221 So. 2d 797, 798 (Fla. 3rd DCA 1969). BellSouth adds that since Supra has essentially filed its response to BellSouth's request for sanctions, Supra's alternative Motion to Strike is moot.

C. Decision

We believe that the concerns raised in Section VI of BellSouth's Opposition to Supra's Motion for Reconsideration do not violate the standard of Rule 1.140, Florida Rules of Civil Procedure, in that the assertions contained therein do not appear to be "redundant, immaterial, impertinent, or scandalous." We do, however, agree that Section IV of BellSouth's Opposition to Supra's Motion to Strike should be stricken, in that the section contains an affirmative request for relief, a request for sanctions, which

[1]We note that such already appears to be the case in this proceeding.

should have been in a motion in accordance with Rule 28-106.204, Florida Administrative Code.[2]

Upon consideration, we find that Supra's Motion to Strike, as it pertains to Section VI of BellSouth's Opposition to Supra's Motion for Reconsideration for a New Hearing in Docket No. 001305-TP, is denied. Further, regarding Supra's Motion for Leave to File Reply to BellSouth's Opposition to Motion to Strike, or in the Alternative, to Strike New Issues Raised in BellSouth's Opposition, we find that the Motion for Leave to File Reply is also denied, but the Motion to Strike New Issues Raised in BellSouth's Opposition, specifically those pertaining to BellSouth's request for sanctions, is granted.

## III. Supra's Motion for Reconsideration of Denial of its Motion for Rehearing of Order No. PSC-02-0413-FOF-TP

Supra

Supra contends that in ruling upon its request for rehearing, we erred in the following respects: 1) we did not correctly apply pertinent legal precedent; and 2) we did not consider the specific facts available to us. In support of these contentions and in addition to its legal arguments set forth in the Motion, Supra has provided exhibits A - Y, which consist of our employee e-mail, memoranda of ourselves and our staff, personnel information, and the hand written notes of our staff.

Specifically, Supra argues that a new hearing should be granted because we failed to apply the proper precedential legal standard for granting a new hearing, which it contends to be "the appearance of impropriety." Supra contends this legal standard was enunciated in Order No. PSC-02-0143-PCO-TP, issued January 31, 2002, issued in Docket No. 001097-TP. Supra contends that this Order clearly established that a party has a right to new hearing

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[2]We note that the Mendoza case cited by BellSouth is distinguished in that it pertained to a "Motion Notwithstanding The Verdict" that should have been styled as a "Motion For Judgment In Accordance With Motion For Directed Verdict." The requested relief was, however, set forth in a motion, though improperly titled.

any time there is the mere appearance of any impropriety or misconduct in the case. Supra emphasizes that the Prehearing Officer's Order did not make a finding that any bias or impropriety occurred in that proceeding, but only that a new hearing should be afforded to Supra in order to "remove any possible appearance of prejudice." Order No. PSC-02-0413-PCO-TP at p. 2.

Supra further contends that our staff's recommendation on its request for rehearing mischaracterized its request as a request based upon staff's recommendation, rather than a request based upon our own precedent. Supra adds that the recommendation and the Order also inaccurately state that Supra alleged that BellSouth and our staff had conspired against it, when Supra instead maintains that it only alleged the existence of the "appearance of impropriety" as a result of Ms. Logue's conduct in Docket No. 001097-TP.

Supra adds that we improperly attempted to modify the standard set by the Prehearing Officer in Docket No. 001097-TP by requiring "evidence or an allegation of any specific improper act" and a demonstration of prejudice. Id. at p. 17-18. Supra maintains that similar variations on the established standard of "appearance of impropriety" occur throughout our decision in Order No. PSC-02-0413-FOF-TP.

Supra also maintains that we have made a mistake of fact in that Supra did identify instances that create the "appearance of impropriety," which it believes warrant a new hearing. Supra extensively references the communication regarding Docket No. 001097-TP between Ms. Logue, a staff supervisor, and the Director of BellSouth's Regulatory Affairs, and maintains that this communication certainly creates an "appearance of impropriety" in this Docket, Docket No. 001305-TP, as well. Supra also references other possible communications between BellSouth and our staff, which it believes constitute improper staff contacts that should serve as a basis for a rehearing in this Docket, including an e-mail in which a member of the legal staff indicates that BellSouth is pleased that a prehearing will be held sooner rather than later.

In addition, Supra alleges that we should have given greater consideration to the results of our own internal investigations regarding Ms. Logue's conduct and infers that our senior staff may

have participated in the falsification of information and official misconduct in violation of Section 839.25(1), Florida Statutes, by not providing accurate information regarding Ms. Logue's conduct and subsequent departure.

Supra emphasizes that this appearance of impropriety and of misconduct is further exacerbated by BellSouth's alleged misconduct in failing to immediately notify us regarding Ms. Logue's conduct with regard to Docket No. 001097-TP. Supra maintains that when these apparent improprieties in Docket No. 001097-TP are coupled with Ms. Logue's attendance at the hearing in this Docket, we must find that an "appearance of impropriety" arises in this Docket, and that it erred in Order No. PSC-02-0413-FOF-TP by failing to so find.

Supra also argues that the notes of Inspector General Grayson's investigation demonstrate actual "improper acts" by our staff regarding Ms. Logue's conduct and that this results in an "appearance of impropriety" in this Docket. Specifically, Supra contends that numerous individuals knew of Ms. Logue's misconduct in Docket No. 001097-TP prior to the hearing in this Docket, but that they failed to notify Supra. Supra contends that this failure to disclose information regarding Ms. Logue's acts prior to the hearing in this Docket creates an "appearance of impropriety" that we failed to consider. Supra notes that it believes that the letter sent to it on October 5, 2001, informing it of Ms. Logue's conduct was designed to intentionally misrepresent when the misconduct was discovered.

Supra also contends that we failed to consider Rule 1.540(b)(2) and (3) of the Florida Rules of Civil Procedure in rendering our decision. This rule provides, in pertinent part, that:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered

> evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding, was entered or taken. . . .

Supra adds that even if we find that Supra's Motion was untimely, we must still order a new hearing pursuant to this Rule, because " . . . Commission Senior Staff which are responsible for overseeing Commission employees were engaged in a "conspiracy" and "cover-up" against Supra." Motion at p. 44.

Finally, Supra argues that we erred in failing to send this case to DOAH for the new hearing. Supra argues that we failed to address this point and our authority to make such an assignment pursuant to Section 350.125, Florida Statutes, and Section 120.57(1), Florida Statutes. Supra argues that this process would be more efficient, would still allow us to make the important public policy decisions, and would provide the parties with a sense of security that they would be receiving a fair and impartial hearing.

BellSouth's Response

BellSouth responds that "Supra's Motion offers no legitimate grounds for reconsideration." BellSouth argues that Supra's motion fails to comply with the standard for reconsideration in that it consists of new arguments, new information, and old arguments that were previously addressed and rejected by us. Furthermore, BellSouth maintains that even if we considered the arguments and information in Supra's motion, none of the information supports

that either actual or apparent impropriety attaches to this Docket and the hearing conducted in it. Therefore, BellSouth argues that Supra has failed to identify an error in our decision or any point of fact or law that we failed to consider.

Specifically, BellSouth argues that much, if not most, of what Supra has raised in its Motion constitutes reargument, which is improper within the context of a Motion for Reconsideration.[3] BellSouth maintains that we have already addressed Supra's arguments regarding alleged impropriety and assignment of this matter to DOAH.

BellSouth also argues that it would not be proper to consider Supra's exhibits A - Y, because these are extra-record exhibits, nor should we address the new arguments raised by Supra, such as its argument regarding the applicability of Rule 1.540(b), Florida Rules of Civil Procedure. BellSouth asserts that it is well-settled that it is improper to consider evidence outside the hearing record in rendering a decision on reconsideration, and that new evidence and arguments cannot be introduced.[4]

In addition, BellSouth argues that Supra cannot show any prejudice occurred in this Docket, nor can it establish even the "appearance of impropriety." BellSouth states that Supra has not shown anything that would indicate Ms. Logue improperly influenced our staff in this Docket. Furthermore, BellSouth emphasizes that it is not staff that rendered the decision but ourselves, the Commissioners, and that we did not simply adopt our staff's recommendation, but instead received additional briefing and oral arguments regarding the issues. As for the attached exhibits, BellSouth argues that these show only a clearer picture of the events that occurred in Docket No. 001097-TP, but that they do not pertain at all to this Docket. BellSouth maintains that Supra's

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[3]*Citing* Diamond Cab Co. V. King, 146 So. 2d 889, 891 (Fla. 1962); Order No. PSC-96-1024-FOF-TP, issued in Docket No. 950984-TP; Order No. PSC-96-0347-FOF-WS, issued in Docket No. 950495-WS; and Order No. PSC-95-0274-FOF-WU, issued in Docket No. 940109-WU.

[4]Order No. PSC-95-0274-FOF-WU, supra; Order No. PSC-01-2051-FOF-TP, issued in Docket No. 990649-TP; and Order No. PSC-97-1510-FOF-WS, issued in Docket No. 960235-WS.

attempts to infer that what occurred in Docket No. 001097-TP creates an "appearance of impropriety" in this Docket are "desperate" maneuvers to reach a conclusion that simply cannot be reached based on the facts presented.

BellSouth further maintains that we did not fail to consider an established standard for setting a matter for rehearing. Instead, BellSouth argues, Supra improperly attempts to convert Chairman Jaber's discretionary decision to reschedule Docket No. 001097-TP into a mandatory rule. BellSouth maintains that "The permissive standards under which the Commission *may* elect to grant a rehearing are not the same as the mandatory standard under which the Commission *must* grant a rehearing. Few would argue that the Commission *must* grant a new hearing if actual prejudice to a party has been demonstrated." (Emphasis in original) Opposition at p. 8; *citing* Reynolds v. Chapman, 253 F.3d 1337 (11th Cir. 2001); Order No. PSC-02-0413-FOF-TP at p. 20. BellSouth emphasizes that it is within our discretion to grant a new hearing upon a lesser showing, but such relief is purely discretionary and does not mandate the same result in every case.

As for Supra's argument regarding the applicability of Rule 1.540, Florida Rules of Civil Procedure, BellSouth believes that this is a "red herring." In addition to the fact that this is a new argument which BellSouth believes could be rejected on that basis alone, BellSouth also maintains that this Rule provides no basis for an administrative body to set a new hearing. BellSouth adds that even if it does, Supra has not made the proper demonstration of fraud to meet the standard of the rule.

Finally, BellSouth argues that Supra's Motion for Reconsideration, including its allegations of misconduct, is improperly interposed for the purposes of harassment and delay and as such, should be rejected in accordance with Section 120.595, Florida Statutes.

Decision

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla.

1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Upon consideration, we find that Supra's Motion for Reconsideration of our denial of its Motion for Rehearing in Order No. PSC-02-0413-FOF-TP fails to meet the standard for a motion for reconsideration. Supra's arguments regarding the linkage between apparent improprieties in Docket No. 001097-TP and this Docket were thoroughly considered and addressed in our Order, as was its request to have this matter set for rehearing and assigned to DOAH. See Order at pp. 9-23. Reargument is improper in the context of a motion for reconsideration. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959).

As for Supra's arguments regarding new information derived from its public records request, this information and the related arguments are extra-record, and as such shall not be considered. Furthermore, the information does not "identify factual matters set forth in the record and susceptible to review," but instead requires much inference in order to reach Supra's conclusions, which does not provide a proper basis for reconsideration. Steward Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); see also Order No. PSC-01-2051-FOF-TP at pp. 18-19.

With regard to Supra's arguments regarding the applicability of Rule 1.540(b)(2) and (3), Florida Rules of Civil Procedure, we not only believe that this is a new argument that should not be considered, but that even if considered, this argument fails on the merits. With regard to subsection (2), the exhibits provided, even if considered "new evidence," pertain to Docket No. 001097-TP and occurrences therein, which logically would not constitute a basis for just relief from our Final Order in this docket and would not change the ultimate result if a new hearing were granted. As set

forth in Morhaim v. State Farm Fire and Casualty Co., 559 So. 2d 1240, 1241 (Fla. 3rd DCA 1990):

> The requirements for granting a new trial on the basis of newly discovered evidence are: (1) **that the evidence is such as will probably change the result if a new trial is granted;** (2) that it has been discovered since the trial; (3)that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching. McDonald v. Pickens, 544 So.2d 261 (Fla. 1st DCA), review denied, 553 So.2d 1165 (Fla. 1989); Kline v. Belco, Ltd., 480 So.2d 126 (Fla. 3d DCA 1985), review denied, 491 So.2d 278 (Fla. 1986); King v. Harrington, 411 So.2d 912 (Fla. 2d DCA), review denied, 418 So.2d 1279 (Fla. 1982). (Emphasis added)

The Morhaim decision also emphasized that, "The rule is well-settled that 'a new trial based on newly discovered evidence must be cautiously granted and is looked upon with disfavor.'" Id. at 1242; *citing* King v. Harrington, 411 So.2d at 915; Dade National Bank of Miami v. Kay, 131 So. 2d 24 (Fla. 3d DCA), cert. denied, 135 So. 2d 746 (Fla. 1961).

As for subsection (3) of the rule, guidance may be derived from the decision in Wilson v. Charter Marketing Company, wherein the court noted that:

> . . . because the Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal decisions are highly persuasive in ascertaining the intent and operative effect of various provisions of the rules." Wilson v. Clark, 414 So.2d 526, 531 (Fla. 1st DCA 1982). In order to be successful under a Federal Rule 60(b)(3) motion, the moving party must establish by clear and convincing evidence that the verdict

> was obtained through fraud, misrepresentation, or other misconduct and that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense. Bunch v. United States, 680 F.2d 1271 (9th Cir. 1982).

Wilson v. Charter Marketing Company, 443 So. 2d 160, 161 (Fla. 1st DCA 1983). See also Fagan v. Powell, 237 So. 2d 579, 581 (Fla. 3rd DCA 1970)( the rule allows a court, "upon the proof of certain facts to its satisfaction," to vacate its own judgment.) We do not believe that Supra's arguments or exhibits establish that fraud, misrepresentation, or other misconduct occurred with regard to this Docket. For these reasons, we believe this argument fails on the merits.

For all of the above reasons, we deny Supra's Motion regarding this issue for failure to meet the standard for reconsideration. We note that Supra filed a Reply to BellSouth's Opposition to its Motion on April 24, 2002.[5] Such a reply is not contemplated by our rules or the Rules of Civil Procedure and as such, it has not been considered.

## V. Supra's Motion for Reconsideration and Clarification of Order No. PSC-02-0413-FOF-TP

In its Motion, Supra seeks reconsideration or clarification of 22 of the 37 issues arbitrated in this docket. Supra also seeks relief pursuant to Rule 1.540(b) of the Florida Rules of Civil Procedure. We now address, in turn, each issue raised by Supra. For reference purposes, the headers and letters identified in our analysis below correspond with the headers/letters of the decisions at issue as they were reflected in Order No. PSC-02-0413-FOF-TP; as such they are not necessarily alphabetical.

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[5]BellSouth objected to the reply on May 1, 2002.

A. Agreement Template.

Supra

Supra argues that it provided evidence that we and the parties are familiar with the current agreement, that BellSouth had previously used existing agreements with ALECs as a starting point for new contracts, and that we had approved such final, arbitrated agreements. Supra believes that BellSouth's claim that the new template reflects changes in the industry and law is unsubstantiated by the record. Supra asserts that BellSouth did not identify any "massive changes" in industry practice and law, and that BellSouth witness Hendrix affirmed that the changes had not been broken down into smaller parts for negotiation by the parties. Supra maintains that any "massive changes" could be incorporated into the parties' current agreement, but this was not done as BellSouth is seeking to completely overhaul the limits of its obligations. Supra also maintains that we simply accepted BellSouth's argument.

Supra also states that while we ordered that BellSouth's most current agreement be used as the parties' base agreement, BellSouth's most current template agreement is not in the record in this proceeding. Supra further states that BellSouth is not the only party to produce an interconnection agreement in its entirety, noting that Hearing Exhibit 4 was a complete copy of the 1997 AT&T/BellSouth agreement as adopted by Supra. Supra believes that BellSouth had the burden to substantiate its claim that massive changes would be required to reflect the changes in law and technology, and that in the absence of BellSouth providing such evidence, or us obtaining such evidence to enter into the record, we should reconsider our decision and require the parties to use the AT&T agreement adopted by Supra as the base agreement.

BellSouth

In its response, BellSouth claims that Supra's motion does not identify any factual or legal point that we overlooked in deciding the issue, and has offered no basis for reversal of our original decision. BellSouth disputes Supra's claim of unfamiliarity with the proposed agreement, noting that Supra was supplied with a draft on July 20, 2000. BellSouth claims that it would be the party

prejudiced if forced to use a different agreement. BellSouth states that Supra only objected to the agreement months after receiving it, and past the time BellSouth would have been able to raise additional arbitration issues. BellSouth maintains that the expired agreement submitted by Supra was not updated or modified, and would not be a meaningful alternative to the template proposed by BellSouth. BellSouth argues that Supra mischaracterizes our intent as to which template agreement should be used and that the base agreement, filed with BellSouth's petition for arbitration, is the correct one.

Decision

Supra argues that we do not point to any evidence in the record that would warrant the use of the current template agreement instead of the existing agreement. However, the Order clearly reflects that we sought an agreement which reflects the current state of the law. BellSouth produced such an agreement very early on in this proceeding. Supra did not. The Order reflects that, based upon the record available, we chose the agreement that would be most suitable. Order No. PSC-02-0413-FOF-TP at pp. 28-29. Further, Supra failed to produce an alternative agreement until after the hearing had begun, and even then it was the expired agreement with no changes or proposed modifications.

Supra also argues that BellSouth's agreement filed as part of the proceeding is not in fact the most current. This is a new argument which was not addressed in the record, and thus is not a proper basis for reconsideration. However, we note that the second full paragraph of page 29 of the Order clearly states "BellSouth's most current template agreement, filed with their petition for arbitration. . . ." (Emphasis added). Because Supra has failed to identify a mistake of fact or law we made in rendering our decision, we find that Supra's Motion regarding this issue is denied.

B. Appropriate Forum for Submission of Disputes Under the New Agreement.

Supra

Supra states that it seeks to keep the same alternative dispute resolution provisions contained in the parties' current agreement. Supra believes that in not adopting Supra's position, we have ignored Supra's evidence of BellSouth's tortuous intent to harm Supra. Supra also believes our interpretation of the decision in BellSouth Telecommunications Inc. v. MCIMetro Access Transmission Services, et al. 2002 US. App. Lexis 373 (11th Cir. 2002)(hereinafter MCIMetro), is flawed. Supra does not believe that the language of Section 364.162(1), Florida Statutes, expressly confers upon us the authority to resolve disputes arising out of previously approved agreements. Supra also contends that the Order failed to cite legal authority for our conclusion that Section 364.162(1), Florida Statutes, is an express delegation of quasi-judicial authority. Supra asserts that the language of Section 364.162(1), Florida Statutes, confers only quasi-legislative power upon us to revisit previously set rates and prices. Supra argues that its interpretation of the plain meaning of the statute requires us to limit our dispute resolution authority to terms and conditions related to prices, and prices only. This, says Supra, is consistent with what it believes is our role as a quasi-legislative ratemaking authority.

Supra then provides its interpretation and analysis of the applicable statute. Supra states that after having examined the legislative intent behind subsection 364.162(1), Florida Statutes, the statute may be read as a whole to properly construe its effect. Supra believes that a reading of the statute affirms our role as a quasi-legislative ratemaking authority. Supra argues that the Florida Supreme Court has affirmed that our essential function is as a "regulator of rates" Southern Bell Tel. and Tel. Co. v. Florida Pub. Serv. Comm'n, at 783, and that this reading is consistent with the 11th Circuit's decision in BellSouth v. MCImetro.

Supra also states that Section 364.162(1), Florida Statutes, is susceptible to more than one reasonable interpretation, and as such requires a review and application of the rules of statutory

construction to discern whether the legislature intended Section 364.162(1) to be an express delegation of quasi-judicial authority. Supra compares the language of Section 364.162(1), Florida Statutes, with that of Section 364.07(2), Florida Statutes, which it deems an explicit delegation of quasi-judicial authority. Through its review of the canons of construction as applied to the above Sections, Supra concludes that the language utilized by the legislature in Section 364.162(1), Florida Statutes, is limiting in nature and does not utilize any of the same terms used in Section 364.07(2), Florida Statutes. As such, says Supra, it cannot be relied upon as authority to adjudicate disputes arising out of previously approved interconnection agreements.

Supra also believes that our decision failed to acknowledge the binding and controlling nature of the 11th Circuit's decision in MCImetro. Supra argues that in its February 7, 2002, Recommendation, our staff reached the incorrect conclusion regarding the force of law of the MCImetro decision, and then revised its position in the February 25, 2002, Revised Staff Recommendation. Supra maintains that the MCImetro decision does have the force of law in Florida, and this requires the analysis of our authority to adjudicate disputes outlined above. Supra believes that the 11th Circuit's decision is binding and controlling until reversed, and that we have not reviewed the record. Supra maintains that our staff has blindly accepted BellSouth's assertions as to the state of the law, and this demonstrates bias in favor of BellSouth

BellSouth

BellSouth believes that Supra's arguments are essentially the same as those included in Supra's post-hearing brief. BellSouth contends that Supra's two assertions, that we misinterpreted our authority under state law and that we failed to acknowledge the binding and controlling nature of the Eleventh Circuit's decision in MCImetro, do not provide a basis for reconsideration. BellSouth asserts that Supra's position amounts to a disagreement with our conclusion. BellSouth believes the record indicates that we did consider the 11th Circuit's decision in MCIMetro. According to BellSouth, the record indicates that neither the Eleventh Circuit nor any court has considered whether we, under Florida law, have jurisdiction to resolve disputes, or whether we have the authority

to compel the parties to submit to binding arbitration. BellSouth reiterates its position that there is no legal support for Supra's position that BellSouth be compelled to submit to arbitration, and concludes that we supported that position in our ruling in the AT&T-BellSouth arbitration in Docket No. 000731-TP.

Decision

Supra has failed to demonstrate that we either failed to consider or overlooked any point of fact or law. The Order clearly demonstrates that we considered the arguments raised by Supra. Thus, Supra's motion on this point is mere reargument, which is inappropriate for a motion for reconsideration. See Order No. PSC-02-0413-FOF-TP at pp. 29-37. Supra's motion regarding this issue is denied.

C. Filing of Agreement by Non-Certificated ALECs.

Supra

Supra maintains that we erroneously relied upon Section 364.33, Florida Statutes in reaching our conclusion, and have read beyond the plain and unambiguous language of the statute. By Supra's reading, any ALEC, whether certified or not, has the right to legally conduct test orders in Florida, so long as the ALEC is not providing telecommunications services to consumers. Supra also questions our authority to impose such a condition, stating that in Issues DD and EE, we declined to impose the adoption of a liability in damages and specific performance provisions on the basis that such provisions were not required to implement an enumerated item under Sections 251 and 252 of the Act. According to Supra, our mere belief that the inclusion of such a provision is in the best interest of Florida consumers fails to meet the conditions mandated by MCI v. BellSouth, 112 F. Supp. 2d 1286.

BellSouth

BellSouth maintains that Supra argues that we misinterpreted Florida law, and disagrees with our conclusion. This, says BellSouth, is not a basis for reconsideration. BellSouth believes that Supra has not identified a factual or legal point that we overlooked in reaching our decision.

Decision

Supra's Motion clearly does not meet the criteria for reconsideration on this point. Supra has failed to identify a point of fact or law that we overlooked when considering our Order. Supra simply reargues that we should have adopted its view of Section 364.33, Florida Statutes. We have considered Supra's arguments and rejected them. See Order No. PSC-02-0413-FOF-TP at pp. 41-43. Accordingly, reconsideration is denied on this point.

Additionally, Supra questions our authority to render a decision on this issue because Supra believes such a decision is not necessary to comply with section 251. According to Supra, in arbitrating Issues DD (damages liability clause) and EE (specific performance clause) we declined to rule on the merits because such a ruling was not required to implement an enumerated item under Sections 251 and 252 of the Act. Supra contends the same logic we used in addressing damage liability and specific performance should apply to this issue as well. We disagree with Supra's assertion. Pursuant to 47 U.S.C. 252(i)(3), a state commission is not prohibited from establishing or enforcing other requirements of state law in its review of an agreement. The Order clearly demonstrates our intent to effectuate state law.

D. Customer Service Records.

Supra

Supra argues that we erroneously determined that Supra should not be able to download Customer Service Records (CSRs) from BellSouth. More specifically, Supra asserts that there is no evidence in the record, other than allegations by BellSouth, that CSRs contain customer proprietary network information (CPNI). Id. Supra believes it is BellSouth's burden to prove that CSRs contain CPNI and that BellSouth failed to meet its burden. As such, Supra requests we reconsider its conclusion that downloading CSRs would violate Section 222 of the Act.

BellSouth

BellSouth contends Supra ignores both the testimony of witness Pate and Supra's own witness Ramos in arguing the record does not

show that CSRs do not contain CPNI. BellSouth also states that Supra is rearguing its interpretation of the Act, which we previously rejected in our Order.

Decision

Supra did not contest BellSouth's assertion that CSRs contain CPNI at hearing or in its post-hearing brief. BellSouth's witness Pate testified that CSRs contain CPNI. See Order No. PSC-02-0413-FOF-TP at p. 44. Furthermore, Supra witness Ramos testified that the Act required individual customer permission to view CSRs. See Order No. PSC-02-0413-FOF-TP at p. 45. Since individual customer permission is necessary only to access material that contains CPNI, it was reasonable for us to infer Supra agreed that CSRs contained CPNI. While Supra may now disagree with our conclusion that CSRs contain CPNI, it is unable to cite any affirmative evidence to the contrary, nor can Supra rebut its own evidence to the contrary. Supra has not met the standard for reconsideration on this point and as such, the Motion regarding this issue is denied. See Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959).

Additionally, Supra asserts that we erred because paragraph 3 of the FCC's Second Report and Order, FCC 98-27, specifically states that carriers are required to share aggregate information with third parties on non-discriminatory terms and conditions. Furthermore, Supra suggests we conduct an investigation into BellSouth's use of aggregate CPNI, citing BellSouth's own stated policy of providing unlimited access to CPNI, which Supra asserts is enunciated in a BellSouth training manual. However, this also does not identify an error in our decision regarding access to CSRs, because CSRs contain individual customer information, not aggregate CPNI; thus, Supra's argument regarding its right to access CPNI in the aggregate does not identify a mistake in our decision.

Finally, Supra requests reconsideration of this issue because Supra contends downloading CSRs provides the best solution to BellSouth's OSS system that is frequently down. This is the same argument Supra made at hearing and in its post-hearing brief. We have considered this argument and rejected it. See Order No. PSC-02-0413-FOF-TP at pp. 43-48.